Legal values and public management.

There is a prima facie tension between legal values and the new public management.

Public law concerns itself with constitutional and near-constitutional values, with hierarchical order, with due process, with rules and standards, with systemic coherence, and with the manners and sustainability of institutional practices. The new public management is concerned with flexibility, experimentation, responsiveness, cost-effectiveness, cost-cutting and performance.

It assumes the state is too large and too costly, and that centralised or rule-oriented solutions are part of the problem.

Where does law fit in the world of new public management? What role do law and lawyers play in the development of new instruments of governance? Is law's concern with precedent and process an impediment to the new public management with its insistence on flexibility? Is it possible for law and lawyers to be responsive in this context without giving up on a long struggle to convince ourselves that there was something unique about public law in the first place? What is the value of public law in a context of downsizing and privatisation? As the public sector shrinks, does public law also "take a cut"? These are large questions. And the latter two, perhaps the latter three, come at it from the wrong perspective. The issue is not whether public law should "take a cut", but whether public service law can "make the cut". This paper will evoke the image of a discipline of public service law that acquires particular shape and purpose in the context of restrained but creative governance.

It will take the view that Anglo-American public law is better suited to be responsive, and to survive, under the new public management than is the continental droit administratif.

Anglo-American discourse about public law as a discipline has been cast—with palpable envy—against the continental ideal of a law-infused and lawcentered rational bureaucratic edifice. Continental administrative law stood out for its unique institutions and its instrumental role in a highly centralised, rule-driven and autonomous state. The hallmark of real public law was the

ease with which it could be demarcated from private law.

The issue today is not one of demarcation, but of implication: i.e., relevance. Those interested in law and governance have no choice but to deal with an evolving and permeable conception of the public and the private. A discipline of public service law that builds on Anglo-American legal traditions and that is contemporary will be public-spirited but will also recognise the essential and expanding role of private sector players in achieving public service objectives. And it will recognise that an important devoir for law—private or public—is to create the climate, the conditions and the values for private sector institutions to lead economic and social development. A public service law in step with the new public management will not insist on a set of remedies and institutions unique from private law; it will insist on a public-interested set of values and a public-spirited perspective that respects the rule of law and democratic values.

This paper will evoke a discipline of public service law en emergence, and which is already in the process of responding to the challenges of the new public management. A new emphasis on clients produces a more effective integration of law, public policy objectives and practical considerations. The search for more effective means of dispute resolution requires public lawyers to be less derivative, and less subservient to the hierarchies and priorities of a litigation-identified private bar. A rigorous and continuing remise en cause of the role of the state, together with the related challenge to develop new instruments of governance, requires an on-going articulation of legal values and, ultimately, of the rule of law. Governance under the new public management is increasingly about the management of values. Public service lawyers are as well suited, and are arguably better suited, for that values-managing climate than are other professional or disciplinary groups in government. In short, the new public management represents a testing ground—at times a caldron—for public service law, offering it an opportunity to find its edges and take on more complete disciplinary shape.